

No. 77-1075

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

**AMERICAN SOCIETY OF TRAVEL AGENTS, INC., ET AL.,
PETITIONERS**

v.

**W. MICHAEL BLUMENTHAL, SECRETARY OF THE
TREASURY, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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The question presented is whether petitioners have standing to challenge the federal income tax treatment of third parties where they allege that such treatment puts them at a competitive disadvantage.

Petitioners, a trade organization of travel agents and 12 travel agents, brought this suit in the United States District Court for the District of Columbia to challenge the tax status of the American Jewish Congress (AJC) and other tax-exempt organizations that operate travel programs for their members. They sought to compel the Treasury either to revoke the tax-exempt status of these organizations or to impose the unrelated business income tax on the income from their travel programs.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. It ruled that large-scale travel activities *per se* do not necessarily foreclose tax-exempt status under Section 501(c)(3) of the Internal Revenue Code 1954, as amended (26 U.S.C.) or require imposition of the unrelated business income tax. In the district court's view, the resolution of these questions depended upon the relationship of the particular travel programs to the exempt purposes of the organizations. The court ruled that its jurisdiction may not be invoked to conduct continuing supervision of the Treasury's administration of the Internal Revenue Code (Pet. App. B, pp. 11a-15a).

The court of appeals affirmed, with one judge dissenting (Pet. App. C, pp. 17a-59a). It held that petitioners lacked standing to maintain this suit under *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26. The court ruled that petitioners "failed to demonstrate an actual injury resulting from * * * [respondents'] administration, with respect to third parties, of the statutory provisions governing tax-exempt organizations" (Pet. App. C, p. 20a).¹

¹Although the court of appeals did not distinguish between the individual travel agents and their trade organization, the organization has no independent standing. As the Court explained in *Simon v. Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 40, the plaintiff-organizations there involved could not establish standing simply on the basis of "[their] abstract concern with a subject that could be affected by an adjudication." Such organizations can claim standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. Since petitioner American Society of Travel Agents alleged no injury to itself as an organization, the standing question "turns upon * * * whether the * * * organization established actual injury to any of * * * [its] members" (426 U.S. at 40; footnote omitted).

1. The court of appeals correctly held that petitioners did not have standing to challenge the tax-exempt status of third-party organizations or to compel the Treasury to impose the unrelated business income tax upon such organizations. The decision is in accord with that court's earlier ruling which this Court recently declined to review. *Tax Analysts & Advocates v. Blumenthal*, 566 F. 2d 130 (C.A.D.C.), certiorari denied, February 21, 1978, No. 77-681. There, the court held that neither a tax-reform organization nor an individual owning a small domestic oil well had standing to challenge the correctness of Internal Revenue Service rulings allowing foreign tax credits to oil companies for payments to foreign countries in connection with oil extraction and production.

Employing the analysis in *Simon v. Eastern Ky. Welfare Rights Org.*, *supra*, the court of appeals here properly recognized that petitioners did not allege any judicially cognizable "injury in fact" and that they failed to establish any nexus between their alleged injury and the actions of the Treasury officials (see Pet. App. C, pp. 20a-21a). Here, as in *Eastern Ky.*, one can only speculate whether the Treasury officials' actions are responsible for the lower costs of the travel programs of the AJC and other tax-exempt organizations. As the court of appeals observed (Pet. App. C, p. 25a), even if these organizations were subject to tax, their travel packages might still cost less than those offered by petitioners as a result of their use of volunteer labor or willingness to accept lower profits than commercial travel agents.

Petitioners erroneously assert (Pet. 9-10) that the court of appeals went beyond *Eastern Ky.* and held that adversely affected competitors are absolutely foreclosed from challenging the failure of federal tax authorities to enforce Internal Revenue Code Sections 501(c)(3) and 511(a)(1) against tax-exempt organizations. To the

contrary, the court of appeals concluded, as this Court did in *Eastern Ky.*, that there was "no need to reach 'the question of whether a third party ever may challenge IRS treatment of another.' 426 U.S. at 37." The decision below turned solely on the court's finding that petitioners had not met the "conventional 'injury in fact' pre-requisite" (Pet. App. C, p. 25a n. 3).

2. Contrary to petitioners' argument (Pet. 10-12), the decision below does not conflict with *Rental Housing Ass'n of Greater Lynn v. Hills*, 548 F. 2d 388 (C.A. 1). There, the court held that where specific proof of competitive injury was not possible because the competing housing project did not yet exist, proof of the likelihood that the plaintiff-landlords would lose tenants to the new project was sufficient. Moreover, the court found there that the alleged injury "'fairly can be traced to the challenged action,'" since if the allegedly unlawful federal action was stopped, the new project would not be built and could not draw tenants away from the plaintiffs (see 548 F. 2d at 390).

Here, on the other hand, since their complaint alleged a current decline in business, petitioners could have cited specific customer losses if they occurred. However, petitioners failed to allege even one instance in which a person who chose a tour sponsored by a tax-exempt organization would have dealt with a commercial travel agent but for the higher cost. Moreover, petitioners did not demonstrate the likelihood that compelling the Treasury to tax the travel income of tax-exempt organizations would cause persons now taking tours sponsored by exempt organizations to patronize petitioners' tours instead.

Nor does the decision below conflict with *Data Processing Service v. Camp*, 397 U.S. 150; *Arnold Tours, Inc. v. Camp*, 400 U.S. 45; or *Investment Co. Institute v.*

Camp, 401 U.S. 617 (see Pet. 12-15). As the Court pointed out in *Simon v. Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 45, n. 25, the complaint in *Data Processing* "alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action."² Here, however, petitioners' alleged injuries may occur regardless of the tax status or tax liabilities of the AJC and similar organizations operating travel programs for their members. There is accordingly no connection between the Treasury officials' actions and petitioners' alleged injuries.

Finally, petitioners contend (Pet. 16-17) that the decision is inconsistent with *Warth v. Seldin*, 422 U.S. 490. But just as in that case, petitioners' complaint here merely alleged in conclusory terms that petitioners had suffered competitive injury, including the loss of customers (Pet. App. A, pp. 7a-8a). Thus, even accepting petitioners' general allegations, petitioners failed to allege the requisite facts demonstrating that any asserted injury was the consequence of the Treasury officials' actions or that the relief they seek will eliminate the alleged injury. See *Warth v. Seldin*, 422 U.S. 490, 504-505. As this Court there stated in terms equally applicable to this case, "[petitioners] rely on little more than the remote possibility, unsubstantiated by allegations of facts, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief" (*id.* at 507).

²The same observation is equally applicable to *Arnold Tours, Inc.* and *Investment Co. Institute*.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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